

ADVISORY OPINION 2002-007

Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered. KRS 121.135(4).

September 27, 2002

Hon. Eileen M. O'Brien
Stoll Keenon & Park LLP
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507

Dear Ms. O'Brien:

This is in response to your letter dated August 29, 2002 to the Kentucky Registry of Election Finance ("Registry") requesting an advisory opinion on behalf of the Coalition Against a Government Takeover ("Coalition") regarding a proposed poll, which may include questionnaires and interviews, of local candidates. You state that the Coalition is an unincorporated association formed by persons concerned with a local, non-ballot public issue. By telephone conversation on August 28, 2002, you confirmed that the issue is the proposed takeover by the Lexington urban county government of the local water utility company. You also confirmed that the membership of the Coalition is based on individuals who have expressed their concern by responding to inquiries on this issue.

Specifically, you ask the following questions, the Registry's response to which follows:

1. May the Coalition report to its members, without endorsement of any candidate, the response of the candidates to written questions or interviews concerning the candidates' position on the Coalition's issue without any reporting requirement or registration with the Registry?

Based on your description, the Coalition does not constitute a committee, as defined under KRS 121.015(3): (1) it does not support or oppose one or specific candidates, (2) it is not organized to advocate or oppose a ballot issue, (3) it is not established for the primary purpose of expressly advocating the election or defeat of clearly identified candidates, and (4) it is not affiliated with a political party. Therefore, it is not required to register with the Registry under KRS 121.170.

Regarding the Coalition's proposal to conduct a poll and report the results, you cite Kentucky Registry of Election Finance v. Louisville Bar Association, Ky. App., 579 S.W.2d 622 (1978). The fundamental issue in Louisville Bar was whether a paid advertisement by the Louisville Bar Association violated Kentucky's prohibition on corporate influence on candidate elections. The court held that the corporate prohibition was not intended to apply to the paid publication of a judicial qualification poll.

The purpose of both the constitutional and statutory provisions appear to be for the prevention of the exertion of unwarranted and perhaps unwholesome influence over political affairs by corporations formed for profit ... The activities of the Louisville Bar Association in this case clearly do not fall within the conduct sought to be avoided by our laws.

Id. at 627.

In addition, the court did limit its holding to the facts determined by the trial court; specifically, that the publication be issued to "inform the electorate of the qualifications of judicial candidates, in an objective manner without preferential declaration or endorsement of any such candidate." Id. at 625.

Federal case law addressing the distinction between express advocacy and issue advocacy is also persuasive. The United States Supreme Court created this distinction in Buckley v. Valeo, 424 U.S. 1 (1976). In upholding the federal campaign finance disclosure requirement, the Court limited its application as to expenditures to "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. In its oft-quoted footnote 52, Buckley, 424 U.S. at 45, the Court outlined the "magic words" test, providing that the construction of the disclosure provision would be restricted "to communications containing express words of advocacy

of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress, 'vote against,' 'defeat,' 'reject.'" Id.

Subsequent cases have consistently limited the regulation of political speech to those expenditures constituting express advocacy. See, e.g., First National Bank of Boston v. Belotti, 435 U.S. 765 (1978), Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238 (1986), and Federal Election Comm'n v. Christian Coalition, 52 F. Supp.2d 45 (D.D.C. 1999).

The activity the Coalition proposes – the publication of a poll of candidates regarding a non-ballot issue, without endorsing any candidates or expressly advocating the election or defeat of any candidate – does not fall within the constitutional regulatory jurisdiction of the Registry. Whether merely a membership communication¹ or a public pronouncement, the publication of the Coalition's poll, as proposed, would constitute neither an independent expenditure as defined under KRS 121.150(1) nor a contribution as defined under KRS 121.015(6). Therefore, the conduct of a poll and the reporting of the poll to the membership of the Coalition, in the manner proposed, is not the type of conduct that requires reporting to the Registry.

2. Can this same information be posted on the Coalition's website without any reporting requirement or registration with the Registry of Election Finance?

Provided no corporate funds, equipment or in-kind services are involved, there is nothing to prohibit the Coalition from publishing the poll results, as described above, on its website. Such a publication, provided it does not expressly advocate the election or defeat of a candidate, does not fall within the Registry's jurisdiction.

3. Can the coalition publish and distribute, without comment or endorsement, the results of the polls, questionnaires or interviews with candidates regarding the Coalition's issue?

As the Kentucky Court of Appeals held in Louisville Bar, to distinguish between a public announcement and a paid for publication of the results of a poll, which does not endorse or expressly advocate the election or defeat of a candidate, would be "a distinction without a difference." Therefore, the Coalition may publish and distribute the results of the poll regarding the Coalition's issue, without reporting such activity to the Registry.

¹ Although the Registry recognizes the associational right of organizations to communicate with their membership, KRS Chapter 121 does not specifically exempt membership communications from Registry oversight. However, since the communication the Coalition proposes does not constitute express advocacy, the Registry need not reach the issue of membership communications.

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This opinion reflects the Registry's consideration of the specific transactions posed by your letter. If you have any additional questions, please do not hesitate to contact the Registry staff.

Sincerely,

Rosemary F. Center
General Counsel

RFC/jh
Cc: Registry Members

Sarah M. Jackson
Executive Director